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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958.

No. 944

HERSHEY MFG. CO., an Illinois Corporation,
Appellant,

vs.

BENJAMIN S. ADAMOWSKI, individually and as State's Attorney of Cook County; JOSEPH D. LOHMAN, individually and as Sheriff of Cook County; TIMOTHY A. O'CONNOR, individually and as Commissioner of Police of the City of Chicago; WILLIAM G. MILOTA, individually and as Bailiff of the Municipal Court of Chicago; and LATHAM CASTLE, Attorney General of the State of Illinois,
Appellees.

On Appeal from the United States District Court
For the Northern District of Illinois.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM.

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I.

The appellee Adamowski's argument advanced in his motion to affirm* is that the challenged statute has not been construed as authorizing the action and threatened

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* Adopted by Attorney General of the State of Illinois.

action pursuant to the statute; that therefore before reaching the constitutional issues tendered it would be necessary for the district court to construe the statute and that since the district court might hold that the statute does not authorize the action sought to be enjoined the constitutional issues might never be reached, and such issues are thus remote and unsubstantial, and the district court of three judges is without jurisdiction.

Such argument is pure sophistry. First, the appellant has never claimed and appellees are in no position to claim that the challenged statute does not authorize the action taken. (R. 8, 197, 210, 297-299, 340, 373, 376.) Second, even if the statute did not authorize the action sought to be enjoined, the district court had jurisdiction to enjoin an unlawful interference with interstate commerce and the taking of property without due process of law and it was error for it to dismiss the complaint for want of jurisdiction.

It should be noted that the appellee's argument that the questions are not substantial is not based on the conventional claims that the federal questions presented are obviously without merit or have been foreclosed by prior decisions. *California Water Service Co.* v. *City of Redding*, 304 U.S. 252, 255. In the motion to affirm it is argued that the need for prior construction of the challenged statute renders the federal questions pleaded too remote and, therefore, unsubstantial. The substantiality of the questions themselves is not disputed. In fact, the motion states, at page 5, "Though a federal right is pleaded there is no certainty that it will ever be disputed."

In the motion it is contended that appellant's products are contraband within the definition of Chap. 38, Ill. Rev.

Stat., §341-343, particularly Section 342 (Motion to Affirm, p. 4). It is argued that the statement in *People* v. *One Device*, 410 Ill. 318, 321-322, that devices which are *manufactured* for gambling purposes, and have no potential for lawful use, are gambling devices *per se* and not the lawful subjects of property *is a holding* that parts and subassemblies of so-called slot machines manufactured for interstate shipment to Nevada and foreign countries for assembly and use in such places outside of the State of Illinois, are contraband.

This contention is inconsistent with other parts of the motion to affirm wherein it is stated "whether any of the Illinois gambling statutes apply to the appellant's devices is yet to be determined by the Supreme Court of Illinois" (Motion, p. 8) and "neither the challenged criminal statute has been interpreted by the Supreme Court of Illinois nor the question of the applicability of any Illinois statute to the appellant's products has ever been determined by that court". (Motion, p. 10)

Appellant does not in this action seek to restrain the enforcement of the 1895 Illinois gambling statute, Ch. 38, Ill. Rev. Stat. 1957, §341-343, because that statute does not apply to appellant's products and there have been no attempts and no threats to enforce said statute against appellant. (Rec. 299). The appellee Adamowski's reference to such statute is a "red herring". In effect he is saying that the federal court cannot restrain him from enforcing the challenged statute which he has applied against appellant and as so applied may well be unconstitutional because another statute which he is not seeking to enforce has not been construed.

Sligh v. *Kirkwood*, 237 U.S. 52, involved the constitutionality of a Florida statute making it a criminal offense

to deliver for shipment in interstate commerce citrus fruits then and there immature and unfit for consumption. The Court upheld the statute, noting that the case did not present a set of facts involving the shipment of such fruit for legitimate commercial purposes and that no act of Congress undertaking to regulate shipments of this character was involved.

Ziffrin, Inc. v. *Reeves*, 308 U.S. 132, involved the constitutionality of a Kentucky statute prohibiting the interstate shipment of liquor without strict compliance with regulatory provisions in the statute. Ziffrin was an Indiana corporation continuously engaged in receiving whiskey from distillers in Kentucky for direct carriage to consignees in Chicago. It brought suit against the Kentucky Commissioner of Revenue to enjoin him from enforcing the provisions of the alcoholic beverage control law. A three judge court dismissed the bill and on direct appeal the Supreme Court affirmed.

The plaintiff charged that the Kentucky law impaired its rights under the Commerce clause of the Constitution.

The Court said, at page 138:

> "The Twenty-first Amendment sanctions the right of a state to legislate concerning intoxicating liquors brought from without unfettered by the Commerce Clause. Without doubt a state may absolutely prohibit the manufacture of intoxicants, their transportation, sale or possession irrespective of where produced or obtained or the use to which they are to be put. Further, she may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect of them. *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, 320. * * *"

The Court held that providing that whiskey removed from permitted channels was contraband and subject

to immediate seizure was within the police power of the state as the property so circumstanced could not be regarded as a proper article of commerce. *Sligh* v. *Kirkwood*, 237 U.S. 52, 59 (involving rotten oranges) and *Clason* v. *Indiana*, 306 U.S. 439 (involving a dead horse), were cited. The Court also said that it was within the police power of a state to ban the manufacture of intoxicating liquor even though it was destined for interstate shipment outside of the state. It said, at page 140:

> "• • • The state may decline to consider certain noxious things legitimate articles of commerce and inhibit their transportation. Property rights in intoxicants depend on state laws and cease if the liquor becomes contraband."

The Supreme Court has recognized that liquor has noxious qualities and the Wilson Act, 27 U.S.C.A., §121, the Webb-Kenyon Act, 27 U.S.C.A., §122, and the Twenty-first Amendment to the Constitution have had the effect of removing shipments of liquor from the protection of the Commerce Clause. *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U.S. 311, and *Leisy* v. *Hardin*, 135 U.S. 100. The *Ziffrin* case is not applicable to slot machines moving in interstate commerce. *Pace Manufacturing Co.* v. *Milliken*, 70 Fed. Supp. 740, at 742.

The statement in the motion at page 6 that in *Doud* v. *Hodge*, 350 U. S. 485, the original jurisdiction of the district court was not involved is in error. The district court decision at 127 Fed. Supp. 853, which was reversed by this Court in a unanimous decision, stated:

> "Plaintiffs argue that 'it is the function and duty of this court to determine whether or not the Act in question violates the Fourteenth Amendment as applied to these plaintiffs.'

"On the other hand the amicus curiae and the defendants argue that it is not the function and duty of this Court to determine that question unless and until plaintiffs secure an answer to question from the Illinois Supreme Court.

"It would seem that plausible argument could be made on behalf of plaintiffs, to the Illinois Supreme Court, predicated upon the fact that the identical similarity of the business conducted by American Express Company, which is exempt from regulation under the Act, and that in which plaintiffs intend to engage and which on its face the Act says must be regulated by the State, is an arbitrary discrimination. If this argument were made to and accepted as valid by the Illinois Supreme Court, it might well grant to plaintiffs the very relief which they are seeking in this Court and hence a suit of this character would be unnecessary. A three judge court, in a case involving a similar situation arising under the Currency Exchange Act of the State of Wisconsin, held that the exemption of the American Express Company rendered the statute discriminatory and unconstitutional as applied to the plaintiff in that case. *Currency Services* v. *Matthews*, 90 Fed. Supp. 40, at 43, 45. However, there no question was raised as to the federal court's jurisdiction, such as the question which now confronts us.

"Whether in plaintiffs' situation the Illinois Supreme Court would hold the exemption of American Express Company from the application of the Act constitutional or unconstitutional we do not know. Not having that prescience, and being unwilling to guess as to how the Illinois court would decide this question when and if it were presented to it, we have no jurisdiction to make that decision ourselves. Hence we cannot decide the constitutional question presented in the absence of such authoritative determination by the Illinois Supreme Court.

Plaintiffs seem to argue that in *McDougall* v. *Lueder*, 389 Ill. 141, the Illinois Supreme Court has already in effect decided that the Illinois Act as to plaintiffs does not violate the equal protection of the law provision of the federal Constitution and accordingly this Court should grant appropriate relief and that no further state court decision is necessary. In so figuring, plaintiffs overlook the plain distinction between the business of the plaintiffs in the *McDougall* case and the business in which they (plaintiffs herein) intend to engage. That distinction plaintiffs themselves have made and emphasized. The McDougall plaintiffs were engaged in the general broad activities of a currency exchange, as distinguished from the limited activities in which plaintiffs herein intend to engage. As we have seen, American Express Company operates only that part of a general currency business which is limited to the issuing and selling of money orders. It does it, without a license issued under the Act, within the same limits plaintiffs wish to operate without being licensed. The Illinois Supreme Court might find that to deny plaintiffs that right would be to deprive them of the same protection which American Express Company enjoys under the law. It well may be that the Illinois Supreme Court would hold the exemption of American Express Company unconstitutional as applied to persons in the position of these plaintiffs and at the same time adhere to its holding that the exemption is constitutional as applied to persons in the position of the McDougall plaintiffs. * * * The federal courts, before passing on the question urged by the present plaintiffs, must wait until the Illinois Supreme Court has spoken in answer to that same question.

It is therefore necessary that the amended complaint be dismissed for want of jurisdiction."

Toomer v. *Witsell*, 334 U.S. 385, is cited in the jurisdictional statement for the proposition that under the cir-

cumstances of this case there is no adequate remedy at law.

The fact that in addition to jurisdiction under Title 18 U. S. C. §1331, there was diversity jurisdiction under §1332 in *Lee* v. *Bickle*, 292 U.S. 415, and *Modern Woodmen of America* v. *Casados*, 15 Fed. Supp. 483, does not distinguish those cases, the first of which holds that jurisdiction must be determined from the facts well pleaded and not the decision which might eventually be reached, and the second of which holds that a three judge court can enjoin state officers who exceed their statutory authority without deciding constitutional questions which required the assembly of a three judge court.

In *United Airlines* v. *Public Utilities Commission*, 109 Fed. Supp. 13, the airline complained of the California Commission which was seeking to regulate it that the regulation of air travel between California and Catalina Island was preempted by the Civil Aeronautics Act and in seeking an injunction attacked the California statute, which had not been previously interpreted by the California courts as giving the state commission jurisdiction, as unconstitutional. The court held that such regulation was preempted and stated that it did not decide the constitutionality of the state statute. The court rejected the California Public Utilities Commission contention comparable to the contention here made that the federal court should decline jurisdiction in order to allow the state courts to adjudicate whether the Commission had jurisdiction. *United Airlines* v. *Public Utilities Commission*, 109 Fed. Supp. 13, at page 16.

In *Cloverleaf Butter Co.* v. *Patterson*, 315 U.S. 148, paragraph 23 of the complaint alleged that the seizures of packaged stock butter from interstate shipments were made by the defendants as officers or agents of the State

of Alabama under the alleged color or pretended authority claimed by them to be in the laws of the State of Alabama Agricultural Code as amended.

It was further alleged in paragraph 24 of the complaint that "plaintiff is advised by counsel, informed and believes and on such advice, information and belief avers that neither the aforesaid statutes nor any other valid statute of the State of Alabama authorizes or justifies, when properly construed, the action of the defendants herein complained of, or interference with the plaintiff's business herein complained of, or their attempt to determine whether or not material used by the plaintiff in the manufacture of process or renovated butter will be deleterious to health or unwholesomeness in the finished product or their seizures on said occasions of said raw material above described and referred to."

Paragraph 25 of the complaint alleged on information and belief that the acts were "wholly outside of and beyond and without the statutes of the State of Alabama when properly construed inasmuch as the Congress of the United States has entered and preempted the field."

There was no prayer that the defendants be enjoined or restrained from enforcing said statute, the only prayers being determining, inspecting, seizing, searching, informing, etc.

II.

This Court will recognize that in *Watson* v. *Buck*, 313 U.S. 387, 400-403, the doctrine of discretionary abstention was applied where there had not been a specific application of the statute to a particular situation. In this case this Court is not being asked to forecast how the challenged statute might conceivably be applied in connec-

tion with a determination of its constitutionality. The statute has been applied by the appellees and the enforcement of the statute and continued threatened enforcement of the statute puts appellees out of business.

There is no question that the imminence of irreparable harm is great and immediate.

This Court has very recently had occasion to consider the application of the doctrine of discretionary abstention in several situations. *County of Allegheny* v. *Frank Mashuda Company*, No. 347, October Term, 1958, 359 U.S. .....; *Martin* v. *Creasy*, No. 157, October Term, 1958, 359 U.S. .....; and *Louisiana Power & Light Co.* v. *City of Thibodaux*, No. 398, October Term, 1958, 359 U. S. .....

This case presents still another situation where the doctrine is drawn in question. The opinion of the district court speaks of the doctrine of discretionary absention but the court says it is without jurisdiction and appellees insist that the district court is without original jurisdiction under Title 28, U.S.C., §1331. But assuming that the district court recognized its jurisdiction and simply abstained from the exercise of the jurisdiction, the question remains was it proper for the court to dismiss the complaint?

As this Court recognizes, the doctrine of discretionary abstention is an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly before it. It can only be justified in the exceptional circumstances where the order to repair to the state courts would clearly serve an important countervailing interest.

The basis advanced for the use of the doctrine in this case is that the challenged statute which appellees have applied against appellant's business has not been previously interpreted as applying to appellant's business

and that if it does not apply then needless friction with state authorities would ensue from an injunction on constitutional grounds restraining the enforcement of the statute against appellant. The basis advanced loses sight of reality. Appellant's main concern is the maintenance of a business now in danger of extinction by reason of appellees' action under the challenged statute. The danger of irreparable injury is great and immediate. To meet this situation appellant sought an injunction in the district court.

The language prohibiting the manufacture of slot machines is clear. Manufacture ordinarily includes the manufacture of component parts, which is appellant's business. The manufacturing process in this case is completed outside of the State of Illinois.

The appellees are in no position to claim that the statute does not apply to appellant's business and appellant has never claimed that the statute does not apply. The charge that the statute is vague and uncertain pertains to the phrase "of the first class" and, therefore, in which counties the statute is applicable, but not to what constitutes the manufacturing of a slot machine.

There is no real countervailing interest in requiring appellant to repair to the state courts to obtain the relief that the district court is capable of granting simply because the statute has not been interpreted. If the statute does not apply to appellant's business the reason for granting an injunction would be to restrain the unauthorized interference with commerce and private property without due process of law. If the statute does apply, then the reason for an injunction is the invalidity of the statute under the Commerce and Supremacy clauses and clauses of the Fourteenth Amendment. In either event appellant's main purpose is an injunction.

The need for an injunction would not be mooted by a state court interpretation of the statute. An injunction will not disrupt an established state administrative process. The complaint alleges that the statute which has been in existence for forty years, the length of time which appellant and its corporate predecessor have been established, has never been used against it before so it cannot be said that restraint upon the use of the statute now against appellant would disrupt established state policy. State taxes are not involved. An injunction would not create needless friction by unnecessarily enjoining state officials from executing domestic policies. Appellant is entitled to an injunction from the district court whether or not the statute applies.

If a countervailing interest were actually present the district court should have retained jurisdiction to permit the parties to repair to the state courts and erred in holding that it was without jurisdiction and dismissing the complaint.

III.

The argument that appellant has an adequate remedy at law in the state courts since it may seek equitable relief in connection with a declaratory judgment suit in the state courts exhibits a lack of understanding as to what is meant by the term "adequate remedy at law".

Appellees have advanced no reason why *Toomer* v. *Witsell* is not applicable.

Respectfully submitted,

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